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IN THE

Supreme Court of the United States

October Term, 1973

No. 73—1535

LEON TROLL, as Executor of the Estate of MORRIS NEWMAN, Deceased,

Petitioner,

v.

ABRAHAM BORUT,

Respondent

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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May 22, 1974

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This reply memorandum deals briefly with the substantive matter on pages 2 and 3 of the memorandum in opposition.

The *Allen* language quoted on page 3 relied on concludes with the statement that to "be invalid, more than mere disparity in price between option price and current value of the stock must be shown." That is precisely the point of the doctrine of unconscionability: the difference must be more than merely disparate; it must be great enough to move the conscience of a court of equity. We believe that the conscience of this court should, and will, be moved by an attempt to buy property for 1/20th of its value. We are not alone in so reading *Allen:*

(a) In Note: *Corporations: Stock Transfer Restrictions: Allen v. Biltmore Tissue Corp.,* 44 Cornell L. Q.

133 (1958), the comment is made that "[I]f the fair market value of the stock greatly exceeded the price received by the corporation when the stock was issued, a decree of specific performance might work a forfeiture and thus be denied."

(b) In the recent New York case of *Kowalsky v. Familia,* 71 M. 2d 287, 336 N. Y. S. 2d 37 (Sup., 1972), the court analyzed and discussed *Allen* in detail and then distinguished it because the statement in *Allen* (relied on by the District Court) that "the validity of the restriction on transfer does not rest on any abstract notion of intrinsic fairness of price" (2 N. Y. 2d 534, 543, 161 N. Y. S. 2d 418, 424), was not applicable to the facts involved in *Kowalsky,* where land worth $26,000 was sought to be purchased for $2,000 (a ratio of 1 to 13).

The statement that no New York decision has been found which refused to enforce a buy-sell agreement because of disparity between price and value is irrelevant, even if it is accurate. What is more to the point is that no New York case has been found which enforced a buy-sell agreement despite a demonstrated *unconscionable* disparity between price and value, as in our case. Indeed, no New York case has been found in which the doctrine of unconscionability in this context has even been considered. Nevertheless, there have been cases both in New York and in other jurisdictions where the doctrine of unconscionability has been applied.

Furthermore, as was said in *Holt v. Seversky Electronatom Corp.,* 452 F. 2d 31, 34 (C. A. 2, 1971):

> "Even if there is an absence of controlling state authority, we are forced, as a federal court vested with diversity jurisdiction, to do the best we can in estimating 'what the state court would rule to be its law.' *Bernhardt v. Polygraphic Co. of Amer-*

> *ica, Inc.*, 350 U. S. 1982, 209, 76 S. St. 273, 279, 100 L. Ed. 199 (1956) (Frankfurter, J., concurring)."

The lack of precedent in a given fact situation is no reason for denying relief. The uniqueness and beauty of the common law, and the source of its strength, is that it can and does apply a settled legal doctrine to new sets of facts and in new contexts, as they arise. Is this not what Judge Rifkind meant when he said in *Paris v. Metropolitan Life Ins. Co.*, 94 F. Supp. 792, 796 (S.D.N.Y. 1947):

> "However, there is a short answer to this argument. When a chancellor for the very first time awarded counsel fees in a class or representative suit, he undoubtedly similarly disappointed the expectations of those who took no account of the development of law. Since it is fair that those who benefited from the efforts of the petitioners should share in the burden, the mere fact that in the past similarly situated beneficiaries escaped is not a valid reason for making that immunity eternal."

The District Court quoted in its opinion from 2 O'Neal: *Close Corporations* 19. Examination of that volume shows that the cases cited therein to support the quoted statement are all distinguishable from our case. In two of the cited cases the ratio of price disparity was substantially below our disparity ratio of 1:20. In another the required sale at the very low price was triggered by a discharge for cause of the employee who owned the stock. In another the defendant shareholder had previously confirmed the selling price fixed in the agreement on *two* separate occasions by refusing opportunities to cancel the agreement. Another case cited is *Allen v. Biltmore Tissue Corp.*, which has been shown above to be not in point on this question.

The last case cited is *In re Mather's Estate,* 410 Pa. 361, 189 A. 2d 586 (1963), which is also cited in the opinion below (53a). However, examination of the opinion in *Mather* shows that it is not in point (as the District Court intimated) because it was expressly based on the principle of upholding a family agreement, "which are always favored in the law." Also, in *Mather* the decedent had himself gotten the benefits of the agreement by making share purchases on the death of other members of the family at 1/50th, or less, of the value of the shares. Clearly this was not so in our case; the decedent's purchases were made only from living shareholders who voluntarily offered their shares, at a time when there had been no appreciable increase in value.

Lastly, it should be noted that, in the very same paragraph in O'Neal from which the court below quoted, there appears the following textual statement:

> "On the other hand, some courts have indicated that they will not enforce a restriction if the transfer price is so small in relation to the true value of the shares as *to make the restriction unconscionable or oppressive,* or to be indicative of fraud or mistake." (Italics supplied.)

This petition should be granted.

Respectfully submitted,

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